UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 24

LORD ELECTRIC COMPANY OF PUERTO RICO[1]

Employer

and

UNION DE TRABAJADORES UNIDOS DE LA AUTORIDAD METROPOLITANA DE AUTOBUSES Y RAMAS ANEXAS

Case 24-RC-8661

Petitioner

and

UNION GENERAL DE TRABAJADORES, LOCAL 1199, SEIU

Incumbent Intervenor

DECISION AND DIRECTION OF ELECTION

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, 29 U.S.C. § 151 *et. seq.* (hereinafter "the Act") as amended, a hearing was held on January 8, 2010 before a hearing officer of the National Labor Relations Board, herein the Board, to determine whether a question concerning representation exists, and if so, to determine the appropriate unit for collective bargaining. Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned.[2]

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[1] The Employer's name was changed to reflect the "Stipulation" signed by the parties at the hearing.

[2] The Petitioner filed a brief in support of its position which has been duly considered. No other briefs were filed. Upon the entire record in this proceeding the undersigned finds:

a. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

I. ISSUES:

There are three issues in this case:

1. Whether the Petitioner is a labor organization within the meaning of Section 2(5) of the Act?

2. Whether the unit described in the Petition is an appropriate unit pursuant to the provisions of Section 9(b) of the Act?

3. Whether the company's operations are currently subject to imminent closure?

II. THE EMPLOYER'S OPERATIONS

Lord Electric Company of Puerto Rico (herein referred to as "the Employer" or "Lord Electric") is a Puerto Rico corporation engaged in the business of providing construction, maintenance, electrical and related services to customers

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b. The record reflects that the Employer is incorporated in the Commonwealth of Puerto Rico and has its principal offices in San Juan Puerto Rico, where it is engaged in the business of providing construction, maintenance, electrical and related services. During the last twelve month period, it purchased and received goods and materials valued in excess of $50,000 directly from points located outside of Puerto Rico and caused them to be transported to its place of business in San Juan, Puerto Rico.

c. Based upon the facts in section b above, I find that the Employer is engaged in commerce within the meaning of Section 2(6) and (7) of the Act and it will effectuate the purposes of the Act to assert jurisdiction herein.

d. The status of Petitioner as a labor organization under Section 2(5) of the Act is one of the issues raised at the hearing by the Intervenor. As more fully explained in this Decision and Direction of Election, I find that the Petitioner is an organization in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment and other terms and conditions of employment. Accordingly, I find that the Petitioner is a labor organization within the meaning of Section 2(5) of the Act. Alto Plastics Manufacturing Corporation, 136 NLRB 850 (1962); Gino Morena Enterprises, 181 NLRB 808 (1970).

e. The parties stipulated and I find that the Incumbent-Intervenor is a labor organization within the meaning of Section 2(5) of the Act.

f. The parties stipulated that there is no current and effective collective bargaining agreement covering the employees in the unit sought in the petition and there is no contract bar to this proceeding.

g. The labor organizations involved both claim to represent certain employees of the Employer.

h. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of section 9(c) (1) and section 2(6) and (7) of the Act.

within the Commonwealth of Puerto Rico. Its clients include the entity known as the Urban Train ("Tren Urbano"), a commuter train that operates in the San Juan Metropolitan Area. Depending on customer demand, the number of employees varies, but currently the Employer employs about 150 employees, 23 of whom are presently assigned to work exclusively at the Urban Train. Most of the Employer's employees are electricians, electrician assistants, plumbers, welders, mechanics, and drivers.

The record reflects that the Urban Train project began in 1996. This project included the construction, operation and maintenance of the Urban Train. Although the record is not clear about the exact relationship among the various entities involved in this project, it appears that the initial contract to construct and operate this commuter train was awarded by the Commonwealth of Puerto Rico Highway Authority to a consortium of entities led by Siemens Company, hereinafter Siemens. Alternate Concepts, Inc. (hereinafter "ACI"), part of the consortium, was contracted to operate, manage and maintain the train when it became operational. It appears that ACI then contracted with a joint venture formed for this purpose between a stateside concern known as "Mass. Electric Co." and "Lord Construction Co.", a local corporation, to provide maintenance services to the train. This joint venture then contracted the Employer in late 2004 to provide maintenance services beginning in early 2005. Since then, the Employer has employed around twenty-three (23) employees to provide maintenance services to the Urban Train.

III. FACTS

A. Bargaining History

The Employer has maintained a bargaining relationship with the Incumbent-Intervenor, for at least the past 40 years. As such, the Incumbent-Intervenor has been the exclusive collective bargaining representative of all of the Employer's construction and maintenance employees at all projects, jobsites, and locations of the Employer (herein called the "Large Unit"). These employees are covered by a collective-bargaining agreement which was not submitted into evidence, nor offered as a bar to this petition, that purportedly expires sometime in July, 2011.

The record reflects however, that in the Year 2005 the Employer and the Incumbent-Intervenor, bargained a separate contract for those employees who work at the Urban Train. The collective-bargaining agreement defines the bargaining unit (herein called "the Urban Train Unit") as follows:

> Included: All maintenance employees of the Tren Urbano ("Urban Train") in Puerto Rico.
>
> Excluded: All other office employees, executives, professionals, administrative employees, security guards, warehouse supervisors, supervisors and employees of construction and installation.[3]

The collective-bargaining agreement covering the Urban Train Unit was effective, by its terms, for the period starting May 13, 2005 through December 31, 2009. It is undisputed that this contract was not extended or renewed by the parties. It is also undisputed that this is the only collective bargaining agreement that has been negotiated for the Urban Train Unit. The Incumbent-Intervenor admits that in the year 2005 the Employer and the Incumbent "split up" the Urban Train Unit from the Large

[3] An English translation is provided of Article I of the expired collective-bargaining agreement between the Employer and the Incumbent-Intervenor. (Joint Exhibit 1, Page 4)

Unit and bargained with the Employer separate collective-bargaining agreements for each unit.

B. The Petitioned Unit and Community of Interest Factors

The Petition defines the Unit as:

> Included: All maintenance employees employed by the Employer at the Tren Urbano ["Urban Train"] in San Juan, Puerto Rico.
>
> Excluded: All other employees, clerks, executives, professional, administratives, warehouse chiefs, construction and installation employees, security guards and supervisors as defined in the Act.[4]

The Employer's Executive Vice-President, Cesar Roman-Rivera, testified that the employees who work at the Urban Train were originally selected and specially trained to provide maintenance services to the Urban Train, from employees who were part of the Large Unit. However, once these employees were assigned to work at the Urban Train, they remained working at that jobsite exclusively. Their terms and conditions of employment were and are exclusively regulated by the expired collective bargaining agreement between the Employer and the Incumbent-Intervenor for the Urban Train Unit.

Occasionally other employees of Lord Electric from the Large Unit have been assigned to work at the Urban Train on temporary assignments ranging from a few days to several months. However, this occurred sporadically, when there was additional work and the regular 23 employees were insufficient to complete the work. The

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[4] This unit description is substantially the same as the unit description included in the Employer's collective bargaining agreement with the Incumbent-Intervenor for the Urban Train Unit, cited above. There are only differences in the redaction of the unit definition, which can be explained by the fact that the document defininig the Unit is originally in Spanish (J.E. 1). It is also patently clear from the record that the Petitioner is seeking to represent the Urban Train Unit employees as they are specifically

managers at the Urban Train, not the Employer, determined whether or not more employees were required on a temporary basis and requested that the Employer provide more employees. Roman-Rivera would then make whatever arrangements were necessary to comply with the Urban Train's request for additional personnel. During the five-year contract, about 15 employees from the Large Unit were referred to the Urban Train to perform short-term or temporary employment. While these employees from the Large Unit worked at the Urban Train, they continued to be covered by the collective bargaining agreement applying to the Large Unit which as the record discloses differed at least as to wages.

C. Imminent Cessation

Roman-Rivera also testified that the contract between the Employer and the joint venture constituted by Mass. Electric Co. and Lord Construction Co. and ACI expired by its terms on January 6, 2010. At the time of the hearing, the Employer did not have a contract to continue services at the Urban Train. However, it was performing maintenance services at the Urban Train under a good faith agreement directly with ACI while at the same time negotiating with it to continue to perform these maintenance services. Roman-Rivera testified that the Employer has a very reasonable expectation of signing a contract for the continued performance of maintenance services at the Urban Train within the next two weeks, and that the negotiations were already underway to sign this agreement.

Additionally, Roman-Rivera testified that the contract between the Puerto Rico Highway Authority and the Siemens consortium, which includes ACI, is set to expire in

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described in Article I of the Employer's collective-bargaining agreement with the Incumbent-Intervenor covering the Urban Train Unit.

June, 2010. ACI is negotiating an extension of the current operation and maintenance contract with the Puerto Rico Highway Authority. If those negotiations are not successful, then the contract between the Siemens consortium and the Puerto Rico Highway Authority will expire by its terms in June, 2010. Because of this, the Employer is currently negotiating with ACI to perform maintenance services at the Urban Train until June 6, 2010. Whether or not the contract with ACI is renewed after this date depends on whether the negotiations between the Puerto Rico Highway Authority and the Siemens consortium are successful.

D. The Petitioner

According to its bylaws, the Petitioner is an organization that was constituted for the purpose of representing employees in regard to collective bargaining with employers. The Petitioner's objectives are: (1) to improve living standards and working conditions of its members, (2) to keep united all the drivers and workers of the Metropolitan Bus Authority and affiliated branches, (3) to promote and support local or federal legislation that better guarantees its' members rights and those of workers in general, to more adequately improve their wages and working conditions, (4) to obtain from all its members a loyal and active support for the objectives, norms, agreements and actions of the union, (5) to maintain a firm adherence to the principles of liberty, equality, justice and brotherhood both on an individual basis as well as in relation to the functioning of the Union.

Article V of the Petitioner's bylaws provides that the Union will be integrated by all good faith members that appear in its membership lists, who are employed by the Metropolitan Bus Authority and/or any other businesses engaged in providing mass

transportation of passengers. The Petitioner's bylaws also establish a Board of Directors and for the democratic bi-yearly elections among the members to select the President, Vice-president, Secretary Treasurer, six (6) vocals, and three (3) finance committee members.

Petitioner's President, Mr. Antonio R. Diaz-Lopez testified that the organization exists for the purpose of bringing justice to employees in wages, better conditions of employment, and other issues of concern to employees. The organization has bargained collective-bargaining agreements on behalf of its members-employees and administers the same. Petitioner currently represents about 993 employees that work at the Metropolitan Bus Authority, and its most recent collective bargaining agreement with the Metropolitan Bus Authority was originally effective until July 14, 2009, and it has been extended until March 2011. Among the employees that Petitioner represents at the Metropolitan Bus Authority are mechanics, automotive technicians, drivers, maintenance and construction workers that deal with the structures of the Metropolitan Bus Authority, cement masons, painters, electricians, carpenters, and others. Petitioner also represents fluid maintenance and supply workers, which include employees in charge of supplying diesel and all oils to buses and other types of fluids to the different vehicles, and employees who clean and maintain the interiors and exteriors of such vehicles.

Petitioner's collective-bargaining agreement with the Metropolitan Bus Authority certifies that it represents all operation and maintenance employees employed by the Metropolitan Bus Authority.

VI. LEGAL ANALYSIS

A. Appropriate Unit Standard

The Board's procedure for determining an appropriate unit under Section 9(b) is to examine first the petitioned-for unit. If that unit is appropriate, then the inquiry into the appropriate unit ends. Overnite Transportation Co., 331 NLRB 662, 663 (2000). It is well settled that the unit need only be an appropriate unit, not the most appropriate unit. Bartlett Collins, supra, citing Morand Bros. Beverage Co., 91 NLRB 409, 419 (1950), enfd. on other grounds 90 F.2d 576 (7th Cir. 1951).

When examining if a petitioned-for unit is appropriate, the Board gives substantial significance to the unit's bargaining history, which can only be overcome by a showing of compelling circumstances that warrant disturbing the bargaining unit. Canal Carting, Inc., 339 NLRB 969, 970 (2003). The party raising compelling circumstances bears the burden of proof. Id. citing Children's Hospital of San Francisco, 312 NLRB 920, 929 (1993) ("It is well settled that the existence of significant bargaining history weighs heavily in favor of a finding that a historical unit is appropriate, and that the party challenging the historical unit bears the burden of showing that the unit is no longer appropriate."); Buffalo Broadcasting Co., 242 NLRB 1105, 1105 fn. 2 (1979) ("The Board is reluctant to disturb units established by collective bargaining as long as those units are not repugnant to Board policy or so constituted as to hamper employees in fully exercising rights guaranteed by the Act."); Columbia Broadcasting System, Inc., 214 NLRB 637, 643 (1974); Great Atlantic & Pacific Tea Co., 153 NLRB 1549, 1550 (1965) ("The Board has long held that it will not disturb an established bargaining relationship unless required to do so by the dictates of the Act or other compelling circumstances.").

In this case, the Petitioner seeks to represent a relatively new unit of employees comprised of 23 employees that work for the Employer performing maintenance work at the Urban Train. These employees are covered by a collective bargaining agreement negotiated by the Incumbent-Intervenor with the Employer in 2005, which applies only to employees permanently assigned to work at the Urban Train. Thus, the bargaining history for the Urban Train Unit is relatively short, with only one expired collective-bargaining agreement in its past.

It is undisputed that this unit was voluntarily carved out by the Employer and the Incumbent-Intervenor five years ago from a larger and broader unit (the Large Unit). However, the record shows that notwithstanding the recent and short bargaining history for this new unit, the parties intended its terms and conditions of employment to be separate and distinct from the terms and conditions of employment for the Large Unit. Thus, the Incumbent-Intervenor bargained separate contracts for each unit, voluntarily "splitting up" the Urban Train Unit from the broader Large Unit, through a separate contract for the Urban Train Unit in 2005.

I am not persuaded that the Employer's and the Incumbent-Intervenor's long bargaining relationship for the Large Unit, trumps their 2005 separate collective-bargaining agreement for a new distinct group of employees covered by a separate contract (the Urban Train Unit). It is clear that they bargained separately for the Urban Train Unit and that the employees in this Unit, enjoy different terms and conditions of employment from those employees belonging to the Large Unit.

In arguing that the Large Unit is the only appropriate unit and that the Urban Train Unit is inappropriate based on its long bargaining history with the Employer for the

Large Unit, the Incumbent-Intervenor is effectively asking the Board to disregard the parties' most recent collective-bargaining agreements, which separate the Urban Train Unit and the Large Unit[5].

In further support of the existence of the Urban Train Unit as a distinct and appropriate bargaining unit, it is noted that the employees covered by the Urban Train collective-bargaining agreement share a community of interest, common terms and conditions of employment, and common supervision. Thus, although some employees from the Large Unit have been temporarily assigned to work at the Urban Train unit, they have retained different terms and conditions of employment from employees in the Urban Train Unit, as they are covered by the Large Unit collective-bargaining agreement. Additionally, as already discussed the bargaining history does not support its position that the Urban Train Unit is not sufficiently distinct from the Large Unit. Therefore, I find and conclude that the unit described in the Petition, the Urban Train Unit, is appropriate under Section 9(b) of the Act. See Crown Zellerbach Corporation, 246 NLRB 202 (1979).

B. Imminent Cessation

"There have been numerous Board decisions establishing that where an employer's operations are scheduled to terminate within three to four months that no useful purpose is served by directing an election." Davey McKee Corporation, 308 NLRB 839, 840 (1992), citing M. B. Kahn Construction Co., Inc., 210 NLRB 1050 (1974); General Motors Corporation, 88 NLRB 119 (1950); Todd-Galveston Dry Docks, Inc., 54 NLRB 625 (1944); Fraser-Brace Engineering Company, Inc., 38 NLRB 1263 (1942), and Fruco Construction Company, 38 NLRB 991 (1942).

[5] The Employer did not take a position on this or any other issue in this proceeding.

It is significant to note however, that petitions have been dismissed only in cases when a permanent layoff is both imminent and certain. Hughes Aircraft Company, 308 NLRB 82, 83 (1992). It is important that both factors be present. Id., citing Larson Plywood Company, 223 NLRB 1161 (1976). In this case, these factors are not met because the Employer is currently still in operation, employing a full complement of employees and it is in the process of concluding negotiations and executing a contract for the continuation of services until June 6, 2010. The date is five months away. The future after that date is uncertain, and while it could constitute speculation as to whether the Puerto Rico Highway Authority will continue its contract with the Siemens consortium for the operation and maintenance of the Urban Train negotiations are underway and are continuing. Likewise, it cannot be said with any degree of certainty that the Employer will cease operations at the Urban Train on June 6, 2010. Therefore, because it is not both imminent and certain that the Employer will cease operations at the Urban Train, the motion to dismiss the petition on this ground is denied.

C. Petitioner's Status as a Labor Organization

Section 2(5) of the Act defines "labor organization" as an organization in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment and other terms and conditions of employment. The Petitioner meets these criteria, as established by a review of its bylaws, existing collective bargaining agreements, and the testimony of its President. There is no controversy regarding Petitioner's purpose, organization, and structure. Accordingly, I find that the Petitioner is a labor organization within the meaning of Section 2(5) of the Act. Alto Plastics

Manufacturing Corporation, 136 NLRB 850 (1962); Gino Morena Enterprises, 181 NLRB 808 (1970).

The Incumbent-Intervenor appears to argue instead, that the Petitioner should not be allowed to represent the petitioned-unit because the Petitioner union is exclusively composed of members that work for the Metropolitan Bus Authority, and its bylaws only authorize it to represent employees who work for enterprises dedicated to the transportation of passengers. Because Lord Electric is not specifically involved in the transportation of passengers, the Intervenor essentially argues that Petitioner is not qualified to represent the Employer's employees.

I am not persuaded that Petitioner is not qualified to represent the Employer's employees, because Petitioner represents a broad spectrum of employees at the Metropolitan Bus Authority, including employees who work in the upkeep, repair and maintenance of the different vehicles and buses. Petitioner already represents employees in similar classifications as those working at Lord Electric and while Lord Electric is not in the specific business of providing mass passenger transportation, it does employ a number of employees that actually work in the maintenance and upkeep of trains and facilities that exist for the purpose of providing mass passenger transportation. These are precisely the kind of employees that Petitioner is seeking to represent, exclusively.

In addition, the Board has held that the willingness of an organization or person to represent employees is the controlling factor, not the eligibility of employees for membership in the organization or the organization's constitutional jurisdiction. Kodiak Island Hospital, 244 NLRB 929 (1979); Community Service Publishing, 216 NLRB 997

(1975); "M" System, 115 NLRB 1316 (1965), NAPA New York Warehouse, 75 NLRB 1269 (1948). It is also worth noting that Petitioner's constitution does not limit its membership to employees of the Metropolitan Bus Authority. Gino Morena Enterprises, 181 NLRB 808 (1970) (allowing a union to represent both government and private employees, so long as its constitution did not restrict its membership to government employees). Accordingly, I refuse to find that Petitioner is not qualified to represent the employees in the petitioned Unit.

VII. THE UNIT:

The following employees of the Employer constitute a unit appropriate for the purposes of collective bargaining within the meaning of section 9(b) of the Act:

UNIT:

> Included: All maintenance employees employed by the Employer at the Tren Urbano [Urban Train] in San Juan, Puerto Rico.
>
> Excluded: All other employees, clerks, executives, professionals, administrative employees, warehouse chiefs, construction and installation employees, security guards and supervisors as defined in the Act.

VIII. DIRECTION OF ELECTION

The National Labor Relations Board will conduct a secret ballot election among the employees in the unit found appropriate above. The employees will vote whether or not they wish to be represented for purposes of collective bargaining by **Union de Trabajadores Unidos de la Autoridad Metropolitana de Autobuses y Ramas Anexas**; the **Union General de Trabajadores, Local 1199**, **SEIU** or neither. The date, time and place of the election will be specified in the notice of election that the Board's Regional Office will issue subsequent to this Decision.

A. Voting Eligibility

Eligible to vote in the election are those in the unit who were employed during the payroll period ending immediately before the date of this Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Employees engaged in any economic strike, who have retained their status as strikers and who have not been permanently replaced are also eligible to vote. In addition, in an economic strike which commenced less than 12 months before the election date, employees engaged in such strike who have retained their status as strikers but who have been permanently replaced, as well as their replacements are eligible to vote. Unit employees in the military services of the United States may vote if they appear in person at the polls.

Ineligible to vote are (1) employees who have quit or been discharged for cause since the designated payroll period; (2) striking employees who have been discharged for cause since the strike began and who have not been rehired or reinstated before the election date; and (3) employees who are engaged in an economic strike that began more than 12 months before the election date and who have been permanently replaced.

B. Employer to Submit List of Eligible Voters

To ensure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses, which may be used to communicate with them. *Excelsior Underwear, Inc.*, 156 NLRB 1236 (1966); *NLRB v. Wyman-Gordon Company*, 394 U.S. 759 (1969).

Accordingly, it is hereby directed that within 7 days of the date of this Decision, the Employer must submit to the Regional Office an election eligibility list, containing the full names and addresses of all the eligible voters. *North Macon Health Care Facility*, 315 NLRB 359, 361 (1994). The list must be of sufficiently large type to be clearly legible. To speed both preliminary checking and the voting process, the names on the list should be alphabetized (overall or by department, etc.). This list may initially be used by me to assist in determining an adequate showing of interest. I shall, in turn, make the list available to all parties to the election.

To be timely filed, the list must be received in the Regional Office on or before **February 1, 2010**. No extension of time to file this list will be granted except in extraordinary circumstances, nor will the filing of a request for review affect the requirement to file this list. Failure to comply with this requirement will be grounds for setting aside the election whenever proper objections are filed. The list may be submitted to the Regional Office by electronic filing through the Agency's website, **www.nlrb.gov**,[6] by mail, or by facsimile transmission at (787) 766-5478. The burden of establishing the timely filing and receipt of the list will continue to be placed on the sending party.

Since the list will be made available to all parties to the election, please furnish a total of **two** copies of the list, unless the list is submitted by facsimile or e-mail, in which case no copies need be submitted. If you have any questions, please contact the Regional Office.

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[6] To file the eligibility list electronically, go to www.nlrb.gov and select the **E-Gov** tab. Then click on the **E-Filing** link on the menu, and follow the detailed instructions.

C. Notice of Posting Obligations

According to Section 103.20 of the Board's Rules and Regulations, the Employer must post the Notices to Election provided by the Board in areas conspicuous to potential voters for at least 3 working days prior to 12:01 a.m. of the day of the election. Failure to follow the posting requirement may result in additional litigation if proper objections to the election are filed. Section 103.20(c) requires an employer to notify the Board at least 5 full working days prior to 12:01 a.m. of the day of the election if it has not received copies of the election notice. *Club Demonstration Service*s, 317 NLRB 349 (1995). Failure to do so estops employers from filing objections based on nonposting of the election notice.

IX. RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, DC 20570-0001. This request must be received by the Board in Washington by February 8, 2010**.** The request may be filed electronically through E-Gov on the Agency's website, www.nlrb.gov,[7] but may not be filed by facsimile.

Dated January 25, 2010.

/s/

[7] To file the request for review electronically, go to www.nlrb.gov and select the **E-Gov** tab. Then click on the **E-Filing** link on the menu and follow the detailed instructions. Guidance for E-filing is contained in the attachment supplied with the Regional Office's initial correspondence on this matter and is also located under "E-Gov" on the Agency's website, www.nlrb.gov.

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